IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHARLES A. FULLER, SR.,	
	Civil Action No. 05 - 1645
Petitioner,	
	Judge Nora Barry Fischer
v.	Magistrate Judge Lisa Pupo Lenihan
DISTRICT ATTORNEY OF FAYETTE COUNTY, NANCY D. VERNON; THE ATTORNEY GENERAL FOR THE STATE OF PENNSYLVANIA,	

Respondents.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Petition for Writ of Habeas Corpus be denied and that a certificate of appealability be denied.

II. REPORT

Petitioner, Charles A. Fuller, Sr., has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, wherein he challenges his conviction of aggravated indecent assault and resultant sentence. For the reasons that follow, his Petition should be denied.

A. Relevant Facts

The relevant facts are as follows.

> Following two mistrials, appellant was convicted of aggravated indecent assault; he was then sentenced to serve 40 to 90 months in prison as well as to register, for the

rest of his life, as a sex offender. The underlying facts of this case, as brought out during the September 11-12, 2002 trial, are as follows.

It was either 1993 or 1994 when S, the victim in this case, fist moved into the home of her aunt and uncle, Amy and Charles Fuller. At the time, the victim was either 13 or 14 years of age and had moved from her parents' home due to their separation and the fact that her mother worked a lot of hours and wasn't home a lot of the time. Yet, since there was no bedroom available at the Fuller's house, the victim slept on the living room loveseat. It was during this time, when S. slept on the loveseat, that appellant Charles Fuller began sexually molesting her.

As S. testified, it would be around midnight, when everyone else was asleep, that appellant would crawl into her bed, reach inside her clothes and fondle her breasts as well as touch the inside and outside of her vagina with his fingers. The victim, however, did not tell anyone this was happening and appellant continued in his ways, doing this a few nights a week.

Approximately one year after S. first moved into the Fuller's home, she was given her own bedroom. Yet, this did not protect S. and appellant continued to do basically the same things. He would also rub his penis on [the victim's] buttocks and vaginal area, fondle [her] breasts and touch [her] with his hands. All told, appellant put his fingers inside her vagina 30 or 40 times.

Further, appellant performed multiple acts of cunnilingus upon his young niece and once, when the victim was 15 years old, appellant attempted to have anal intercourse with her. As the victim testified, appellant placed his penis inside [her] anus for a brief moment and only stopped when the victim screamed in pain.

Until the victim turned 20 years of age, she never told of these abominations that were done to her; even denying to her Aunt Amy Fuller that appellant ever touched her inappropriately.

In the year 2001, however, the victim finally came forward with her allegations. This led to an investigation and, on January 23, 2002, appellant was questioned in the Oklahoma County Jail by Trooper James Pierce (an investigator for the Pennsylvania State Police) and Detective Lawrence Curry (the Chief County Detective for the Fayette County District Attorney's Office). According to Trooper Pierce's testimony, appellant initially denied the victim's allegations. After what must have been a matter of minutes, however, appellant admitted that when the victim was 13 or 14 years old, he would place his middle finger in her vagina. He also admitted that he fondled her vagina and fondled her breasts approximately four or five times in the living room, and once inside a tent in the backyard of the residence. According to appellant, the victim would take her pants and underwear off, that he would place his middle finger into her vagina, and he went on to say that the victim would also stroke his penis. Appellant denied ever attempting anal intercourse with his niece. And, when asked to reduce his oral statement to writing, appellant refused . . . .

Appellant took the stand and denied absolutely everything. According to appellant, Trooper Peirce and Detective Curry were making all that up; he never admitted to molesting his niece. As to why the victim would invent such a story, appellant decided that this must be revenge for the way he treated his wife during the then-ongoing divorce proceedings.

The jury, however, convicted appellant of one aggravated indecent assault count (for conduct that occurred after May 30,

> 1995). Unanimously, the jury also found appellant not guilty for aggravated indecent assault (for acts prior to May 30, 1995) and involuntary deviate sexual assault (for acts prior to may 30, 1995). The jury deadlocked on the charge of involuntary deviate sexual assault (for post May 30, 1995 conduct) and the trial court declared a mistrial on that specific count. . . .

Sup.Ct.Op. dated May 12, 2005, pp. 1-4 (doc. no. 13-14, pp. 20-23) (internal citations, quotations and footnotes omitted).

B. Exhaustion Requirement

The provisions of the federal habeas corpus statute at 28 U.S.C. § 2254(b) require a state prisoner to exhaust available state court remedies before seeking federal habeas corpus relief. To comply with the exhaustion requirement, a state prisoner first must have fairly presented his constitutional and federal law issues to the state courts through direct appeal, collateral review, state *habeas* proceedings, *mandamus* proceedings, or other available procedures for judicial review. *See, e.g.*, Castille v. Peoples, 489 U.S. 346, 351 (1989); Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996); Burkett v. Love, 89 F.3d 135, 137 (3d Cir. 1996).

It appears that the Petitioner has presented the majority of his claims to the Pennsylvania courts through his direct appeal and his PCRA proceedings. As set forth in detail below, it is also clear that Petitioner has not demonstrated that he is entitled to federal habeas corpus relief with respect to

any of his claims. Accordingly, to the extent that Petitioner has not fully exhausted any of his claims, this Court will review them under the authority granted in 28 U.S.C. § 2254(b)(2), which provides that a federal court may deny a petitioner's claims on the merits notwithstanding a petitioner's failure to comply with the exhaustion requirement. *See* 28 U.S.C. § 2254(b)(2) (as amended by The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 142 Cong. Rec. H3305-01 (1996).

C. Standard of Review

Section 2254 of the federal habeas corpus statute provides the standard of review for federal court review of state court criminal determinations. 28 U.S.C. § 2254. Specifically, a federal court must accord a presumption of correctness to a state court's factual findings, which a petitioner can rebut only by clear and convincing evidence. 28 U.S.C. § 2254(e). Where a state court's factual findings are not made explicit, a federal court's "duty is to begin with the [state] court's legal conclusion and reason backward to the factual premises that, as a matter of reason and logic, must have undergirded it." Campbell v. Vaughn, 209 F.3d 280, 289 (3d Cir. 2000). In determining what implicit factual findings a state court made in reaching a conclusion, a federal court must infer that the state court applied federal law correctly. *Id*. (citing Marshall v. Lonberger, 459 U.S. 422, 433 (1982)).

A federal court may not issue the writ unless it concludes that the state court's adjudication resulted in a decision that was “contrary to,” or an “unreasonable application of,” clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). In Williams v. Taylor, 529 U.S. 362 (2000), Justice O’Connor, writing the opinion of the Court for Part II, discussed the independent meanings of the "contrary to" and "unreasonable application" clauses contained within section 2254(d)(1).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 411-13. *See also* Lockyer v. Andrade, 538 U.S. 63 (2003).

Where the state court fails to adjudicate or address the merits of a petitioner’s claims, the federal habeas court must conduct a *de novo* review over pure legal questions and mixed questions of law and fact. Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001).

D. Double Jeopardy

Petitioner's first claim asserts a violation of the Double Jeopardy Clause of the Fifth Amendment. The Fifth Amendment to the Constitution provides, in pertinent part, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.[1] The Fifth Amendment's guarantee against double jeopardy protects a criminal defendant against multiple punishments or repeated prosecutions for the same offense. United States v. Dinitz, 424 U.S. 600, 606 (1976). "Underlying this constitutional safeguard is the belief that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " *Id*. (citations and quotations omitted). Notwithstanding, the Double Jeopardy Clause does not guarantee that the State will vindicate its societal interest in the enforcement of the criminal laws "through the vehicle of a single proceeding for a given offense." United States v. Jorn, 400 U.S. 470, 484 (1971).

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1 The Fifth Amendment proscription on multiple punishments for the same offense is binding on the States through the Fourteenth Amendment. North Carolina v. Pearce, 395 U.S. 711 (1969); Benton v. Maryland, 395 U.S. 784 (1969).

Petitioner's double jeopardy claim is twofold. First, he claims that, during his first trial, the Commonwealth wrongfully elicited a statement from a prosecution witness to purposefully cause a mistrial. Second, he claims that the second trial ending in a hung jury should have precluded a third trial.

The relevant Supreme Court precedent applicable to petitioner's double jeopardy claim is set forth in Oregon v. Kennedy, 456 U.S. 667 (1982) (majority opinion by Justice Rehnquist, joined by Burger (then C.J.), White and O'Connor, JJ., concurrence by Powell, J.)). In Kennedy, the Supreme Court discussed the difference between the double jeopardy protection afforded where the trial is terminated over the objection of the defendant vs. circumstances where a mistrial is declared at the bequest of the defendant. In the former circumstance, the Supreme Court explained that the "manifest necessity" standard is the appropriate test to determine whether to lift the double jeopardy bar to a second trial. Kennedy, 456 U.S. at 672 (citing United States v. Perez, 9 Wheat. 579, 580, 6 L.Ed. 165 (1824)). The Court further explained that the "hung jury" was the "prototypical example" meeting the manifest necessity standard such as to allow a second trial. Kennedy, 456 U.S. at 672.

Where a mistrial is declared at the request of the defendant, however, the Supreme Court concluded that the "manifest necessity" standard was not applicable. *Id*. In this

situation, the Court held that the Double Jeopardy Clause prohibits a second prosecution for the same offense only when the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. *Id*. at 679. The Court explained its holding as follows.

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Kennedy, 456 U.S. at 675-76 (citation omitted) (emphasis added).

With respect to Petitioner's first claim, the Superior Court determined that the record evidence did not disclose an intention on the part of the Commonwealth to cause a mistrial. Specifically, the Court found as follows.

> . . . In this case, it is clear that Trooper Pierce's "Oklahoma City Jail" reference (which led to the June 3, 2002

mistrial) was a mistake on Trooper Pierce's part; yet, it was not, at all, something intended by the prosecutor.

During appellant's June 3, 2002 trial, Assistant District Attorney (ADA) Jack Heneks asked Trooper Pierce "when did you contact the defendant?" Trooper Pierce responded to this question by answering "That was on January 23, of this year at the Oklahoma City Jail in Oklahoma." Appellant's counsel immediately objected and, in a sidebar, moved for a mistrial. A mistrial was then granted.

Yet, the question ADA Heneks posed to Trooper Pierce was "when" he first contacted the defendant, not "where." The "where" was told by Trooper Pierce on his own and was not even suggested by the question asked of him. Further, at the PCRA hearing, not only did ADA Heneks testify that a mistrial would have been the last thing [he] would have wanted to do in this case, but his version of the events was corroborated by appellant's defense attorney. As appellant's defense attorney explained, ADA Heneks was very upset by the mistrial and was not happy with both the statement of Trooper Pierce and Judge Capuzzi's ruling.

As the PCRA Court found,

> the Assistant District Attorney acted in good faith and . . . his question was not asked in bad faith with the intent to prejudice or harass the defendant. There is absolutely no evidence which points to the conclusion that the Assistant District Attorney deliberately set out to abort the first trial in order to bolster his case against the defendant or to secure a more favorable jury panel. There is no evidence to suggest that the Commonwealth was not fully prepared or that the

> prosecutor did not have all of his witnesses available to testify. In fact, the victim and her aunt had been called prior to Trooper Peirce's appearance on the witness stand. We find that the mistrial occasioned in the June 3, 2002 trial was the result of a mere error on the part of a Commonwealth witness and not the result of overzealous prosecution, nor was there the intent to prejudice or harass them.
>
> The PCRA Court's findings are entirely supported by the evidence: ADA Heneks neither directly nor indirectly intended for Trooper Pierce's statement. Thus, the mistrial of June 3, 2002 did not bar any subsequent trial for appellant's crimes and appellant's trial counsel cannot be held ineffective for failing to raise this meritless claim.

Sup.Ct.Op. dated May 12, 2005, pp. 14-16 (doc. no. 13-14, pp. 33-35) (internal citations, quotations and footnotes omitted).

This federal court is required to accord a presumption of correctness to the Superior Court's factual finding that petitioner's mistrial was not the result of intentional prosecutorial conduct. Sumner v. Mata, 449 U.S. 539, 546 (1981). Petitioner can overcome this presumption only through the use of clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). In this action, Petitioner has failed to set forth any evidence whatsoever, let alone by clear and convincing evidence, to rebut the Superior Court's factual finding that petitioner's mistrial was not the result of intentional prosecutorial conduct. Nor has

he demonstrated that the Superior Court's determination that his second trial was not barred by the Double Jeopardy Clause is contrary to, or involved an unreasonable application of, clearly established Federal law. *See* Kennedy, 456 U.S. at 679 ("Since the Oregon trial court found, and the Oregon Court of Appeals accepted, that the prosecutorial conduct culminating in the termination of the first trial in this case was not so intended by the prosecutor, that is the end of the matter for purposes of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution."). Accordingly, Petitioner has not carried his burden of demonstrating that he is entitled to habeas corpus relief with respect to his first double jeopardy claim.

With respect to his second double jeopardy claim, the Supreme Court specifically has held that a trial resulting in a hung jury does not bar retrial on the same charges. Kennedy, 456 U.S. at 672. Thus, the Pennsylvania Courts similar conclusion is not contrary to, or an unreasonable application of, clearly established Federal law. Accordingly, Petitioner has not carried his burden of demonstrating that he is entitled to habeas corpus relief with respect to his second double jeopardy claim.

E. Failure to Call Witnesses

In his second and third claims, Petitioner asserts that his trial counsel was ineffective for failing to contact witnesses on his behalf who would have questioned the testimony

of the prosecution witnesses and that the PCRA Court refused to allow him to present these witnesses.

With respect to his ineffective assistance of counsel claim, the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (*quoting* Strickland v. Washington, 466 U.S. 668, 684 (1984)). *See also* Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (the essence of a claim alleging ineffective assistance is whether counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect). The Supreme Court has formulated a two-part test for determining whether counsel rendered constitutionally ineffective assistance: 1) counsel's performance was unreasonable; and 2) counsel's unreasonable performance actually prejudiced the defense. Strickland, 466 U.S. at 687. The first prong of the Strickland test requires a defendant to establish that his attorney's representation fell below an objective standard of reasonableness by committing errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 688. The second prong requires a defendant to demonstrate that counsel's errors deprived him of a fair trial and the result was unfair or unreliable. Strickland, 466 U.S. at

689. A defendant is not entitled to relief unless he makes both showings. *Id*. at 687.

With respect to Petitioner's due process allegation that the PCRA Court erred by refusing to allow his witnesses, a claim that one was denied "due process" is a claim that one was denied "fundamental fairness." *See* Riggins v. Nevada, 504 U.S. 127, 149 (1992). "A trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been properly conducted." Foy v. Donnelly, 959 F.2d 1307, 1317 (5th Cir. 1992) (internal quotation marks omitted).

In reviewing Petitioner's witness claims, the PCRA Court held as follows.

> At the PCRA hearing, appellant alleged his counsel's ineffectiveness for failing to present the testimony of two individuals: Darlene Fronius and Amanda Perdikaris. And, while appellant attempted to place the testimony of both women on the record, the PCRA judge ruled their testimony irrelevant and precluded their taking the stand. While appellant takes issue with this ruling, there is no doubt it was correct.
>
> According to appellant, Darlene Fronius
>
> > would have testified and attacked the credibility of Appellant's ex-wife. Specifically, the Appellant's ex-wife testified in the third trial that the parties had an amicable divorce and that they were not having any problems. Ms. Fronius would have provided testimony that Appellant and his

> ex-wife had a bitter relationship during their divorce; thus, casting doubt on Appellant's ex-wife's testimony as a whole.

Appellant's Brief, at 11.

> The problem with appellant's claim is that Amy Fuller, appellant's ex-wife, **never** testified that the divorce as "amicable and that they were not having any problems."
>
> . . .
>
> Appellant's claim is therefore baseless; the testimony appellant seeks to impeach was never spoken.
>
> Further, even if Ms. Fuller did testify that the divorce was "amicable," Darlene Fronius' testimony would not entitle appellant to a new trial. This is because Ms. Fuller explicitly testified that she never "witnessed Mr. Fuller touch [the victim] . . . in an inappropriate sexual manner." N.T. Trial, 9/11/02, at 40. The only testimony of substance Ms. Fuller gave concerned the fact that she had, on one occasion, woken "up in the middle of the night and found my husband not in bed, he was gone for a while so I got up to check to see where he was and he was standing in [the victim]'s room." *Id*. at 38. Appellant was, however, fully clothed, the victim was sleeping in bed, and appellant was merely standing in her room. According to appellant's explanation at the time, he was just "checking on her." *Id*. Thus, there was simply no "credibility" to undermine. Ms. Fuller did not give damning testimony and, even had trial counsel called Darlene Fronius, there would have been "[absolutely zero] probability that the outcome of the challenged proceeding would have been different."
>
> Appellant also claims his counsel was ineffective for failing to call Amanda

Perikaris, a woman who would testify that

> [S.], the victim in this case, also told someone that Mr. Fuller had inappropriate sexual contact with Miss Perikaris. [The victim] made the allegation that he had, at least that's what Miss Perdikaris would testify to, and Miss Perikaris would deny that Mr. Fuller ever had any inappropriate sexual contact with her.

PCRA Hearing, 2/11/04, at 29.

> As the PCRA judge so well stated: "the proposed testimony was not relevant to the issues in this case and . . . bringing before the jury statements that Mr. Fuller allegedly had inappropriate sexual contact with another person would, at the very least, have been prejudicial to the defendant." PCRA Court Opinion, 7/14/04, at 12. We agree; appellant's strange argument is wholly without merit.

Sup.Ct.Op. dated pp. 6- 9 (doc. no. 13-14, pp. 25-28) (emphasis in original) (some internal citations omitted).

As revealed by the discussion above, the Pennsylvania Superior Court found that the absence of the proposed witness testimony did not render Petitioner's trial fundamentally unfair; nor was his counsel ineffective for failing to call these witnesses. Petitioner has not demonstrated that these holdings are contrary to, or an unreasonable application of, clearly established Federal law. Accordingly, Petitioner has not carried his burden of demonstrating that he is entitled to habeas corpus relief with respect to his second and third claims.

F. Excessive Sentence

Petitioner's final claim challenges the legality of his sentence. Petitioner is not entitled to habeas corpus relief with respect to this claim as he has failed to allege the denial of any federal constitutional right. In this regard, a state prisoner may seek federal habeas corpus relief only if he is in custody in violation of the Constitution or federal law. Smith v. Phillips, 455 U.S. 209 (1982); Geschwendt v. Ryan, 967 F.2d 877 (3d Cir.), *cert. denied*, 506 U.S. 977 (1992); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). Thus, a writ of habeas corpus is available under 28 U.S.C. § 2254(a) only on the basis of some transgression of federal law binding on the state courts. Engle v. Isaac, 456 U.S. 107, 119 (1982). Violations of state law or procedural rules alone are not a sufficient basis for providing federal habeas corpus relief. *Id*. Thus, a writ of habeas corpus is not available when a state prisoner merely alleges that something in the state proceedings was contrary to general notions of fairness or violated some federal procedural right unless the Constitution or other federal law specifically protects against the alleged unfairness or guarantees the procedural right in the state courts.

Generally, sentencing is a matter of state criminal procedure and does not fall within the purview of federal habeas

corpus. Wooten v. Bomar, 361 U.S. 888 (1959). As such, a federal court normally will not review a state sentencing determination that falls within the statutory limit, Williams v. Duckworth, 738 F.2d 828, 831 (7th Cir. 1984), as the severity of a sentence alone does not provide a basis for habeas relief. Smith v. Wainwright, 664 F.2d 1194 (11th Cir. 1981) (holding that a sentence imposed within the statutory limits can not be attacked in habeas proceeding). *Accord* Gleason v. Welborn, 42 F.3d 1107, 1112 (7th Cir. 1994) (internal citation omitted), *cert. denied*, 514 U.S. 1109 (1995); Walker v. Endell, 850 F.2d 470, 476 (9th Cir. 1987), *cert. denied*, 488 U.S. 926 (1988); Mira v. Marshall, 806 F.2d 636, 639 (6th Cir. 1986); United States v. Myers, 374 F.2d 707 (3d Cir. 1967). Thus, unless an issue of constitutional dimension is implicated in a sentencing argument, this Court is without power to grant habeas relief. United States v. Addonizio, 442 U.S. 178, 186 (1979) (noting that a criminal sentence was not subject to collateral attack unless the sentencing court lacked jurisdiction to impose it or committed a constitutional error that made the sentence or underlying conviction fundamentally unfair). *Accord* Colon v. Folino, 2008 WL 144212, at *9 (M. D. Pa. Jan. 11, 2008).

Absent a claim that the sentence constitutes cruel and

unusual punishment prohibited by the Eighth Amendment,[2] or that it is arbitrary or otherwise in violation of the Due Process Clause, the legality of a sentence is a question of state law. Chapman v. United States, 500 U.S. 453, 465 (1991). "[A] person who has been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual ... and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." *Id*. (citations omitted).

Petitioner alleges that his sentence violates the Equal Protection Clause because he received a sentence of forty to ninety months along with a life-long sexual registration requirement under Megan's Law and an individual named Barry McCreary, who was found to be a violent sexual predator, was sentenced by the same judge on the same day to only 24 to 48 months imprisonment with only a ten year registration requirement.

The Equal Protection Clause provides that no state

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2. A sentence violates the Eighth Amendment of the Constitution only when it is extreme and "grossly disproportionate to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) ("The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime.") (citation omitted).

shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. "This is not a command that all persons be treated alike but, rather, 'a direction that all persons similarly situated should be treated alike.' " Artway v. Attorney General of State of N.J., 81 F.3d 1235, 1267 (3d Cir. 1996) (quoting City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985)). *See also* United States v. Armstrong, 517 U.S. 456 (1996) (Equal Protection Clause prohibits decision to prosecute based on an unjustifiable standard such as race, religion, or other arbitrary classification).

The level of scrutiny applied to ensure that classifications comply with this guarantee differs depending on the nature of the classification. Classifications involving suspect or quasi-suspect class, or impacting certain fundamental constitutional rights, are subject to heightened or "strict" scrutiny. City of Cleburne, 473 U.S. at 439. Other classifications are subject to the "rational basis" test, which requires that a classification need only be rationally related to a legitimate state interest to survive an equal protection challenge. F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993) (statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any

reasonably conceivable state of facts); Chapman v. United States, 500 U.S. 453, 465 (1991).

Prisoners are not a suspect class. Lee v. Governor of State of N.Y., 87 F.3d 55, 60 (2d Cir. 1996); United States v. King, 62 F.3d 891, 895 (7th Cir. 1995); Latham v. Brown, 11 F.3d 1070, 1993 WL 394802 (D.C. Cir. 1993). Because prisoners are not a suspect class, the government may treat defendants differently as long as its decisions are "rationally related to a legitimate ... [government] interest." King, 62 F.3d at 895 (quoting City of Cleburne, 473 U.S. at 440). Moreover, to demonstrate an equal protection violation, an person has the burden of proving the existence of purposeful discrimination. Hernandez v. New York, 500 U.S. 352 (1991); McCleskey v. Kemp, 481 U.S. 279, 292 (1987). Official action does not violate the Equal Protection Clause solely because it results in a disproportionate impact; proof of discriminatory intent or purpose is required to show a violation. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239 (1977); Stehney v. Perry, 101 F.3d 925, 938 (3d Cir. 1996). Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group. Hernandez, 500 U.S. at 360. In

other words, a person must offer evidence specific to his own case that would support an inference that unlawful considerations played a part in the adverse decision. McCleskey, 481 U.S. at 293.

It is firmly established that mere discrepancy in the sentences imposed upon two similarly-situated individuals does not constitute a violation of equal protection. *See* Dorszynski v. United States, 418 U.S. 424 (1974); Jones v. Superintendent of Rahway State Prison, 725 F.2d 40, 43 (3d Cir. 1984) (no equal protection violation where there was no contention that sentencing disparity was the result of discrimination based on race, sex or similar grounds). No two prisoners, being different human beings, will possess identical backgrounds and characters for purposes of sentencing. Indeed, it is difficult to believe that any two prisoners could ever be considered "similarly situated" for the purpose of judicial review on equal protection grounds of broadly discretionary decisions because such decisions may legitimately be informed by a broad variety of an individual's characteristics. Thus, the function of the court is limited to ensuring that, in sentencing Petitioner, the trial judge was in fact, exercising his professional judgment and not discriminating against him for reasons unrelated to legitimate security interests.

In this regard, in upholding Petitioner's sentence, the

Superior Court held as follows.

> In the present action, the trial court had the benefit of a pre-sentence report, and was therefore fully aware of all relevant circumstances. The trial judge, in imposing the sentence of from forty months to ninety months, explained his reasons for the sentence imposed as follows:
>
> > In sentencing the defendant as we have we've taken into consideration the nature of the offence and the seriousness of aggravated indecent assault, a felony of the second degree which, as we have indicated, is punishable by a term of imprisonment of up to ten years in prison and a fine of up to $25,000.00. We have considered the offense to which you have been found guilty by a jury of your peers. We have considered also that you were in a supervisory capacity over the victim of the crime. We're also taking into consideration that this conduct as the victim testified to was repeated over a period of time by you. We have before us a pre-sentence report, as I've indicated, prepared by the Fayette County Adult Probation Office which we are taking into consideration. We have also taken into consideration your prior record. We have taken into consideration what we believe to be your rehabilitative needs and the gravity of this offense. The Court feels that any lesser sentence would certainly depreciate the seriousness of this crime. The Court feels that you are in need of correctional treatment that can be provided most effectively by your

commitment to an institution.

N.T. December 12, 2002, pp.4-5.

> On this record we see no reason to disturb the sentence in this case. The sentencing court observed the appellant throughout these proceedings, studied his history, considered his prospective rehabilitation, and therefore was in the best possible position to determine an appropriate sentence. The trial court considered (1) the nature and gravity of the offense, (2) the statutory limit of incarceration, (3) the supervisory position of appellant, (4) the fact that the conduct was repeated and engaged in over a period of time, and (5) all other relevant factors, including the criminal history, character, and condition fo appellant. Under the facts of this case, there is absolutely no basis for the claim of appellant that the sentence of from forty months to ninety months was "unreasonable."

Sup.Ct.Op. dated October 17, 2003, pp. 8-10 (doc. no. 13-9, pp. 63-65) (internal citations omitted).

Here, the state courts found that the sentencing court imposed a legal sentence within the statutory limits and that the sentencing court gave legitimate reasons to support its decision. Consequently, Petitioner has failed to show that he is entitled to habeas corpus relief with respect to his sentencing claim.

G. Certificate of Appealability

28 U.S.C. § 2253(c) codifies the standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. Amended Section 2253 provides that "[a] certificate of

appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

Petitioner has not made any showing that he was denied any of his constitutional rights. Accordingly, a certificate of appealability should be denied.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that the Petition for Writ of Habeas Corpus be denied and that a certificate of appealability be denied.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) & (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have ten (10) days from the date of service of the objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

Lisa Pupo Lenihan
U.S. Magistrate Judge

July 16, 2008

cc: Nora Barry Fischer
United States District Judge

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